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No. 88-856

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

PETER CHEMA,

Petitioner,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTRODUCTION

The fundamental issue presented by this petition is whether a federal district court, in choosing a remedial measure to vindicate the constitutional rights of certain citizens, may infringe the fundamental constitutional rights of another citizen, when the constitutional rights of both can be accommodated simultaneously by the use of measures which do not unnecessarily intrude upon the constitutional rights of the latter citizen.

The position of the Government and the NAACP requires that the individual constitutional rights and privileges of Yonkers City Councilman Peter Chema, and his immunity as a legislator, be needlessly sacrificed.

In asking this Court to deny certiorari and not review the important constitutional questions raised in this case, the Government and the NAACP would leave the resolution of basic issues going to the core of our system of shared power to rest upon faulty premises and flawed conclusions, to wit: that the contempt power was used merely to enforce a commitment made by Chema or on his behalf; that the act of casting a legislative vote is not a form of speech protected by the First Amendment; that the doctrine of legislative immunity protects a local legislator only against private damage actions under 42 U.S.C. § 1983 but not against the imposition of contempt sanctions for the manner in which he casts his legislative vote; that the balance this Court must strike is between the governmental interest in enforcing court orders vindicating Fourteenth Amendment rights on the one hand and the integrity of the Yonkers City Council's legislative process on the other; and that a constitutionally acceptable price to pay for the exercise of a local legislator's constitutional rights is relinquishment of office and the corresponding nullification of his constituents' right to elect their representative. As we will show, each of these conclusions is incorrect.

ARGUMENT

A. The Contempt Power Was Not Exercised To Enforce Any Commitment Made By Councilman Chema.

The pervasive error in the argument of the Government and the NAACP is the premise that the contempt power was used

merely to enforce a promise allegedly made or a commitment "voluntarily undertaken",[1] Government Brief, p. 12, NAACP Brief, p. 13, and that Councilman Chema was bound by the Decree, notwithstanding his vote against it. The District Court issued the contempt citation explicitly to enforce its July 26, 1988 order, which sought to compel Councilman Chema to vote in a specific way on a specific ordinance, Appendix pp. 13c, 19c, 26c, 33c, 37c, 2g and 2u, something Councilman Chema had never agreed to do.

There is no dispute that Councilman Chema voted against the Decree when the Council was asked to approve it in January 1988. Appendix p. 34c. There was no consent, no agreement, no meeting of the minds, and no commitment by Councilman Chema to vote for implementing legislation.[2]

The Government, the NAACP, the District Court and the Court of Appeals all incorrectly expand the Council majority's power to bind the City (which we concede) to include authority to bind individual council members with respect to future legislative acts.

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[1] In an opinion filed about one month after its opinion challenged here, the Court of Appeals concluded that "... Yonkers entered into the Consent Decree ... only after being threatened by the district court with sanctions for contempt." *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855, 865 (2d Cir. 1988). The Government is wrong when it denies linkage between the threat of contempt and the Council's approval of the Decree. Government Brief, p. 17 n.21.

[2] Assuming *arguendo*, that the contempt power was purportedly used to enforce the Decree, it is clear that the Decree could not be so enforced against Councilman Chema because "only the parties to the decree can be held in contempt of court for failure to comply with its terms." *Local Number 93, International Assoc. of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 530 (1986).

Contrary to the implication in the Government's Brief, p. 16, n. 21, elected legislators are not mere "officers" (*i.e.*, ministerial or merely executive functionaries) as is clearly contemplated by Fed. R. Civ. P. 65(d). No rule or procedure or, indeed, any rule of inherent judicial authority to enforce judgments, can impair fundamental constitutional rights and historic immunities. Thus, Fed. R. Civ. P. 65(d) does not alter the rule that legislators are not subject to injunctions for purely legislative acts. *See Star Distributors, Ltd.* v. *Marino*, 613 F.2d 4, 9 (2d Cir. 1980); *Hoellen* v. *Annunzio*, 348 F. Supp. 305, 314 (N.D. Ill. 1972), *aff'd*, 468 F.2d 522 (7th Cir. 1972), *cert. denied*, 412 U.S. 953 (1973).

Moreover, Fed. R. Civ. P. 65 (d), cited by the Government, applies to only injunctions and restraining orders, and not to judgments.

In any event, the Ordinance, which Chema was ordered to vote for, went beyond the terms agreed to by the majority of the Council in the Decree. The Ordinance denied the Council the right reserved to it by the Decree to exercise its own judgment with respect to quality of life factors before approving zoning changes which would affect any particular area.[3]

B. The Majority Vote In Favor Of The Consent Decree Did Not Require Councilman Chema To Vote As Directed By The July 26, 1988 Order.

Another error in the reasoning of the Government and the NAACP is the assumption that the vote of the majority of the Council to approve the Decree obligated the individual legislators constituting the minority who voted against it, to vote later to implement its terms.

The argument that a majority vote of a legislative body on one statute or resolution binds individual legislators to vote consistently with the original legislative act (explicitly made by the NAACP at pp. 13-16 of its Brief in Opposition, and implicitly by the Government at p.12 of its Brief) violates a fundamental principle of our representative government. A legislature, by enacting legislation, cannot deprive individual legislators of their right later to vote to change that legislation. *See United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 17 (1977), *reh'g denied*, 431 U.S. 975 (1978).

Legislative bodies may not limit the unfettered discretion of their successors to consider legislation. "[O]ne legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature." *Fletcher* v. *Peck*, 6 Cranch 87, 135 (1810)

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[3] The Decree reserved to the Council the right to consider the impact of any zoning change on the surrounding community. The Ordinance, on the other hand, gave that power to the Office of Implementation and the Yonkers Planning Board. The Council never agreed to give up its discretion. *Compare* Appendix p. 71 *with* Appendix p. 16-23p.

The Affordable Housing Ordinance amended Yonkers' existing zoning ordinance, Yonkers Code, *Zoning*, Chapter 107, Appendix 1p, and made substantive zoning changes to increase land use densities, for example, *Id.* at 3p, notwithstanding any provision of the existing zoning law to the contrary. *Id.* at *15p*.

(Marshall, J.). *See also Marin* v. *Foster*, 45 N.Y. 2d 287, 293, 408 N.Y.S. 2d 387, 390-91, 380 N.E. 2d 217 (1978) ("Elected officials must exercise legislative and governmental powers, within their own sound discretion, as the needs require. Ordinarily they may not so exercise their powers as to limit the same discretionary right of their successors to exercise that power and must transmit that power to their successors unimpaired"); *People ex rel. Devery* v. *Coler*, 173 N.Y. 103, 110, 64 N.E. 956 (1903) ("Nothing is better settled in our jurisprudence [than] that one legislature cannot bind the hands or limit the power of subsequent legislatures"); *Freeman* v. *Lamb*, 33 A.D. 2d 331, 333, 308 N.Y.S. 2d 580, 582 (4th Dep't 1970) ("a retiring [City] Council may not legislate to limit the power of a successor Council to act"). *See also Wrzeski* v. *City of Madison*, 558 F. Supp. 664 (W.D. Wis. 1983) (city ordinance requiring city council members to vote yea or nay on every resolution held invalid).

It is self-evident that a legislative majority cannot pass legislation which purports to bind the individual members of the minority to vote in a particular manner.

C. The July 26 Order And The Contempt Judgment Violated Councilman Chema's First Amendment Rights.

Neither the Government nor the NAACP has met the argument Councilman Chema made in his petition for certiorari that the District Court's July 26 order, which compelled Councilman Chema to vote in a particular way on a specific ordinance, violated his right of free speech. Rather, the Government patches together its disjointed arguments that legislative immunity should not apply and that the "City Council had already committed itself to enact the legislation under the terms of the Consent Decree," Government Brief, p. 20, to reach the *ipse dixit* conclusion that Councilman Chema had no right to express his dissent by voting "no". We have already dealt with the "prior commitment" branch of the argument, and shall discuss, *infra*, the legislative immunity issue. The First Amendment argument, however, stands on independent grounds.

It is well-settled that conduct, if sufficiently expressive, may be protected as free speech under the First Amendment. *See, e.g., Spence* v. *Washington*, 418 U.S. 405 (1974) (displaying the flag

with a peace symbol attached is protected); *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (wearing armbands); *Wooley* v. *Maynard*, 430 U.S. 705 (1977) (state's motto on license plate is speech, and right *not* to display motto and thus not to speak is protected).

Councilman Chema's vote concerned an important public issue, and the message Councilman Chema conveyed by his vote was "core political speech." The First Amendment "affords the broadest protection to such political expression in order to 'assure [the] unfettered interchange of ideas for the bringing about of political and social changes...'" *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976), *quoting Roth* v. *United States*, 354 U.S. 476, 484 (1957). As this Court pointed out in *Bond* v. *Floyd*, 385 U.S. 116 (1966), the First Amendment protects the most important function of legislators—the ability to freely discuss their views:

> [The government has] no interest in limiting... legislators' capacity to discuss their views of local or national policy. The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy.

Id., at 135-36 (footnote omitted).

This "latitude" must include the right to vote freely. Without protection to vote as their consciences dictate, legislators would be unable to fulfill their duty to their constituents. Curtailment of a legislator's right to vote as he wishes interferes with the protected relationship between a legislator and his constituents, and deprives not only the legislator, but also the electorate, of their fundamental constitutional right to vote. *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208 (1986); *Democratic Party of The United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Powell* v. *McCormack*, 395 U.S. 486, 527 (1969); *Reynolds* v. *Sims*, 377 U.S. 533 (1964). As Jefferson and Madison wrote 190 years ago:

> ... for the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties toward each other... is to put the legislative de-

> partment under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation, which requires essentially that the representative be as free as his constituents would be, that the same interchange of sentiment be lawful between him and them as would be lawful among themselves were they in the personal transaction of their own business. . .

T. Jefferson and J. Madison, *Protest to the Virginia House of Delegates* (1797) in 8 *Works of Thomas Jefferson*, 322-23, 325-27.

Likewise, the Government's contention that a legislator loses his First Amendment rights when he enters office (Government Brief, pp. 19-20) is wrong. The sole reason advanced for this absurd proposition is that, in the cases heretofore decided by this Court involving attempts to constrain the speech of legislators, the Court relied upon other constitutional principles to uphold the legislator's right to vote.[4] However, there is no basis in logic or law for the Government's contention that a legislator is stripped of his fundamental right of free speech when he engages in his legislative activities. "Plaintiff's status as a legislator does not strip [him] of any rights [he] would otherwise enjoy under the First Amendment to speak freely or to speak not at all." *Wrzeski* v. *City of Madison*, 538 F. Supp. at 667.[5] Indeed, as is shown above, the position of a legislator as a spokesman for the electorate, as well as for himself, enhances the already compelling rationale for the constitutional protection of legislative free speech.

The Government also argues that Councilman Chema's individual First Amendment right of free speech was somehow overruled by the Council's commitment to enact legislation. Government Brief, p. 20. Such a "waiver" not only violates the fundamental principles of legislative prerogative (*see supra* at 3), but also would indirectly constitute a deprivation of Councilman

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[4] We agree, of course, with the Government that should the Court rule that Councilman Chema was cloaked with legislative immunity, it may not need to reach the First Amendment issue.

[5] The action challenged in *Wrzeski* was a city ordinance that purported to compel city council members to vote "yes" or "no" on proposed legislation, and to prohibit them from abstaining. The July 26 Order was still more repugnant, because it purported to compel him to vote yes, and even abstention would subject him to contempt sanctions.

Chema's First Amendment rights by the majority of the City Council. That, clearly, is at odds with the fundamental and overriding constitutionally protected right of free speech.

Because the speech involved in this case is "core political speech", the burden on the Government to justify its limitation or, in this case, abolition, is "well-nigh insurmountable." *Meyer* v. *Grant*, _U.S. _, 108 S. Ct. 1886, 1894 (1988). The conflict between the governmental interest and Chema's individual rights in this case is not between the governmental interest in having lawful court orders or judgments implemented on the one hand, and the integrity of the Council's legislation process on the other (both of which are legitimate ends). Rather, it is between the *means* used by the District Court to compel a legislative act—which is speech, and using the contempt power to coerce that act, and Chema's First Amendment rights and legislative immunity privilege.

As Councilman Chema demonstrated in his petition for certiorari (Petition at 9-11), the District Court need not have infringed Councilman Chema's First Amendment rights in order to implement the long-term plan. Rather, the District Court had at its disposal means far less intrusive[6] upon Chema's individual rights[7] than a dictated vote backed up by the contempt power and its possible deprivation of Chema's liberty and property.

The argument that Councilman Chema could retain his First Amendment right by voting "Yes" while saying that he did not really favor the Ordinance is constitutionally unacceptable. *See, e.g., Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974); *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 475 U.S. 1 (1986); *Riley* v. *National Federation of the Blind*, _U. S. _, 108 S. Ct. 2667 (1988). Officially imposed hypocrisy cannot be sanc-

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[6] The City Council advised the District Court that it did not have the statutory authority to consent to the appointment of an affordable housing commission, but the Council did not oppose the creation of a commission, as the Government suggests. *See* Government Brief, p. 18, n. 22. The Council stated, "[T]here is little doubt that the City Council would lack the power to delegate those functions to a commission which is not popularly elected. . ." Appendix p. 2w; *see also* 3c, 13-14n.

[7] The Government misses the mark when it speaks of minimal "intrusion on the City Council's legislative process" and "slight interference with the routine working of the Council." Government Brief, p. 15. The issue raised by this petition is the unnecessary sacrifice of Councilman Chema's *individual* constitutional rights and legislative immunity.

tioned by this Court; the very notion is unworthy of the heirs of Hamilton, Madison and Jefferson. The ambiguous message a "yes" vote and contrary words would convey would give rise to the belief that Councilman Chema had failed to act on his beliefs and convictions, and had changed his theretofore consistent view. *See Clarke* v. *United States*, No. 88-3190, slip op. at 7 (D.D.C. Dec. 13, 1988).

To the extent the Government contends that Councilman Chema's "recourse was to resign," Government Brief p. 20, resignation is a constitutionally impermissible price for a legislator to have to pay for the exercise of his constitutional rights, because it violates "[T]he true principle of a republic. . . that the people choose whom they please to govern them." Alexander Hamilton, 2 *Debates on the Federal Constitution* 257, *cited in Powell* v. *McCormack*, 395 U.S. 486, 527 (1969).

D. The Legislative Immunity Doctrine Is Not Limited To Private Damage Actions.

Contrary to the Government's suggestion that Councilman Chema's legislative immunity claim "far exceeds the bounds of the doctrine," Government Brief, p. 16, the application of legislative immunity here would be totally consistent with, and within the confines of, the doctrine as set forth in *Tenney* v. *Brandhove*, 341 U. S. 367, *reh'g denied*, 342 U.S. 843 (1951). As the Government concedes, Government Brief, p. 14, "[t]he purpose of [legislative] immunity is to insure that the legislative function may be performed independently without fear of outside interference." *Supreme Court of Virginia* v. *Consumer Union*, 446 U.S. 719, 731 (1980). The independent performance of the legislative function is here ensured by affording Councilman Chema legislative immunity for his debate and vote, as dictated by his conscience, on the political, economic and social issues affecting his constituency. As stated by this Court in *Forrester* v. *White*, 484 U.S.__, 56 U.S.L.W. 4067, 4069 (Jan. 12, 1988), "immunity is justified and defined by the functions it protects and serves. . . ." Immunity is plainly justified here because Councilman Chema was exercising a purely legislative function.

Further, the Government's attempt to argue the inapplicability of legislative immunity by noting that *Tenney*, and subse-

quent cases, involved private actions under 42 U.S.C. § 1983, is not persuasive. First, before and after *Tenney*, this Court has applied the principle of legislative immunity in cases not arising under Section 1983. *See, e.g., Gravel* v. *United States*, 408 U.S. 606 (1972); *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881). Although the watershed case of *Tenney* involved a private damage action brought under 8 U.S.C. § 43, the predecessor statute to 42 U.S.C. § 1983, the rationale and reach of the Court's broad analysis was not in any manner confined by that circumstance. Indeed, the Court, in *Tenney*, traced the roots of "[t]he privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings" to the English parliamentary struggles of the 16th and 17th centuries, in which the doctrine of legislative immunity arose to protect members of Parliament from coercion by the executive. *Tenney* v. *Brandhove*, 341 U.S. at 372; *See also Gravel* v. *United States*, 408 U.S. at 616. In fact, this case, in which the Government vehemently urged the District Court to use the contempt power, is closely analogous.

CONCLUSION

The unprecedented response of the District Court to Councilman Chema's act of casting a legislative vote raises issues which merit review by this Court.[8] This case presents the core issue of whether those remedial measures can properly include an order by a district court directing a local legislator how to vote, or face jail if he were to vote otherwise.

Although the Government and the NAACP would have the Court view all of the petitioners without distinguishing among

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[8] Contrary to the NAACP's assertion, Councilman Chema does contest the District Court's "authority to enter . . . the Order of July 26, 1988 . . ." NAACP brief, p. 24. Councilman Chema filed a timely notice of appeal of the July 26th order. Appendix p. 1s, and challenged its validity in the Court of Appeals. Court of Appeals Brief of Peter Chema, p. 2. He was the only Councilman to have done so. His right to challenge the underlying order is clear, *see United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, _U.S._, 108 S.Ct. 2268 (1988); *United States* v. *Thompson*, 319 F.2d 665, 668 (2d Cir. 1963); *United States* v. *Baird*, 241 F.2d 170, 172 (2d Cir. 1957), and was never questioned below. It was entirely appropriate for Councilman Chema, as a matter of "conscience," to test the validity of the July 26th order by submitting to the civil contempt sanction, especially where, as here, he raises an issue of the "excessive use of judicial power." *See United States Catholic Conference* v. *Abortion Rights Mobilization Inc., supra.*

them, the facts and legal issues pertaining to Councilman Chema are different from those pertaining to the City as a defendant and certain of the other councilmen-petitioners. The principal arguments Councilman Chema makes, *i.e.*, that as a dissenter in the vote approving the Decree, he is not bound by the "commitment" of the majority; that he has legislative immunity from attempts to impose liability for casting his legislative vote; and that his right to vote his conscience is a right protected by the First Amendment, distinguish him from the City of Yonkers and from those councilmen who voted to enter into the Decree.

This is the right case in which to decide these issues. The opposing positions stand in stark opposition to one another, and there has been real damage to personal rights, freedoms and immunities in this case of great notoriety. Housing desegregation cases are also likely to give rise to these issues in the future.

The orders of the District Court frame the issues of individual rights in such a way that a decision by this Court would guide federal courts and local officials in similar situations. This Court should issue a writ of certiorari to review the case of Peter Chema.

Dated: New York, New York
February 23, 1989

Respectfully submitted,

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Supplemental Appendix

EXHIBIT S

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *et. al.*,

v.

Civil Action No.
80 Civ. 6761 (LBS)

YONKERS BOARD OF EDUCATION, *et. al.*,

ORDER

On July 26, 1988, this Court entered an order requiring the City of Yonkers to pass on or before August 1, 1988 the legislative package relating to the long-term plan as described in Section 17 of the first remedial consent decree in equity dated January 28, 1988 and the long-term plan order dated June 13, 1988 ("Affordable Housing Ordinance"). Following entry of that order, counsel for the City raised a number of questions as to the applicability of state law provisions relating to amendments to the City's zoning ordinance. Rather than deal with any question of federal preemption, this court notified counsel for the City and the plaintiffs by letter dated July 28, 1988 that compliance with its July 26th order could be met by adoption by the City Council of a resolution committing the City to enact the affordable housing ordinance within the time prescribed by notice pursuant to state law.

The July 26th order further provided that, upon the City's failure to enact the legislative package as required, the City and its individual City Council Members would be required to show cause at a hearing on August 2nd as to why they should not be held in civil contempt of the July 26th order.

At the hearing held on August 2, 1988, counsel for the City advised that on August 1, 1988, the City Council, by a vote of 4-3, refused to adopt the required resolution. Members of the City Council voting against the resolution were identified as Vice-Mayor Henry Spallone, majority leader Nicholas Longo, Edward Fagan and Peter Chema.

At the hearing, the individual Council Members were called to appear and show cause why they should not be adjudged in civil contempt of the July 26th order.

Council Member Spallone advised that he had not yet obtained counsel, but desired to do so. Although this court believes that Mr. Spallone had adequate notice to retain counsel as of August 2nd, this court hereby adjourns the hearing on his possible contempt until 10:00 A.M., August 3, 1988, to assure his representation by counsel.

Council Members Longo, Chema and Fagan appeared with counsel. Each of those Council Members was given an opportunity to show cause why he should not be held in civil contempt of this Court's July 26, 1988 order. Having considered the arguments of all parties and the Council Members, this court finds as to Messrs. Longo, Chema and Fagan:

1. That each such Council Member received adequate notice as to his duty under the July 26th order;

2. At the hearing on August 2, 1988, each such Council Member had an opportunity to be heard;

3. That each such Council Member had the ability to comply and a full understanding of the consequences of his non-compliance; and

4. That each such Council Member receive adequate notice of the possible need to retain counsel prior to the August 2nd hearing and that any claim on their part of inadequate representation due to a lack of time to consult with counsel must fail. Any such delay in consultation must be attributed to the Council Members themselves and not to this court or the parties.

Accordingly, Messrs. Longo, Chema and Fagan are hereby adjudged to be personally in civil contempt of this court's July 26, 1988 order.

Therefore, it is hereby ORDERED that Messrs. Longo, Chema and Fagan:

1. Shall each be personally fined $500 per day every day until such time that he purges himself of contempt by voting to enact the affordable housing ordinance, or a resolution of intent to

adopt the same, or such time that the City has so acted. Payment of these fines shall proceed as set forth in paragraph 4 of this court's July 26, 1988 order. The first check is due and payable by 4:30 P.M. on August 3, 1988. Any such checks payable pursuant to this paragraph shall be held by the Clerk of the Court until August 12, 1988, preserving the Clerk's power to refund such payments should this court find reasons between now and August 12th to set aside these findings of contempt;

2. Any such Council Member who has not purged himself of civil contempt on or before August 10, 1988 shall be committed on August 11, 1988 to the custody of the United States Marshall until such time as the City enacts the legislation or until such individual Council Member purges himself of contempt. The contempt fines shall continue during any time of imprisonment.

It is further ORDERED that by 4:30 P.M. on August 5, 1988, counsel for Messrs. Spallone, Chema, Longo and Fagan shall advise this court in writing whether they desire a further evidentiary hearing in this matter. If such a hearing is desired, it will be held at 10:00 A.M., August 8, 1988.

It is further ORDERED that the applications of Messrs. Fagan and Longo for a stay of this order are denied.

SO ORDERED:

DATED: August 2, 1988
New York, New York

UNITED STATES DISTRICT JUDGE

EXHIBIT T

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, and
YONKERS BRANCH NAACP, *et. al.*,
Plaintiff-Intervenors,

- *against* -

YONKERS BOARD OF EDUCATION,
CITY OF YONKERS and YONKERS
COMMUNITY DEVELOPMENT AGENCY,
Defendants.

NOTICE OF APPEAL

80 Civ. 6761 (LBS)

Notice is hereby given that Peter A. Chema appeals to the United States Court of Appeals for the Second Circuit from an order entered by District Judge Leonard B. Sand in this action on July 26, 1988.

Dated: New York, New York
August 10, 1988

BOWER & GARDNER

By: _____
Attorneys for Peter A. Chema
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(212) 751-2900

TO: MICHAEL W. SCULNICK, Esq.
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BRIAN MEFFERNAN, Esq.
Attorney for Department of Justice
Civil Rights Division, Room 7525
United States Department of Justice
10 and Pennsylvania Avenues, N.W.
Washington, D.C. 20035-6998

EXHIBIT U

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, and
YONKERS BRANCH NAACP, *et. al.*,
Plaintiff-Intervenors,

- *against* -

YONKERS BOARD OF EDUCATION,
CITY OF YONKERS and YONKERS
COMMUNITY DEVELOPMENT AGENCY,

Defendants.

NOTICE OF APPEAL

80 Civ. 6761 (LBS)

Notice is hereby given that Peter A. Chema appeals to the United States Court of Appeals for the Second Circuit from a judgment of civil contempt entered by District Judge Leonard B. Sand in this action on August 2, 1988.

Dated: New York, New York
August 4, 1988

BOWER & GARDNER

By: _____
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(212) 751-2900

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EXHIBIT V

UNITED STATES OF AMERICA,

- against -

80 Civ. 6761 (LBS)

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*

July 12, 1988
10:30 a.m.

(In open court)

THE COURT: Good morning. To begin on a positive note, I would like to read into the record a letter received by the court from Mr. Dudley, dated June 29.

"Dear Judge Sand:

"On behalf of Dr. Batista and the Board of Education I want to express to the court our appreciation for the characteristically effective efforts of Dr. Pastore in helping to resolve the recent budget dispute between the board and the city.

"His intervention was instrumental in making possible a solution that was mutually acceptable and I know that I express Mr. Sculnick's sentiments as well.

"Some with inconveniently long memories may recall that at the time of the school remedy hearings it was the school district, through its intrepid counsel, who objected to the appointment of a monitor as unnecessary, wasteful and intrusive, et cetera.

"The next time around I may want to rethink that position.

"Very truly yours,

"John H. Dudley, Jr."

A very gracious letter and I am sure much appreciated.

This court yesterday received a memorandum of law from the City of Yonkers which we deemed to be of sufficient impor-

tance so that we will mark it as Court Exhibit A of today's date so that it will become part of the record.

(Court Exhibit A marked)

THE COURT: It represents the court believes a significant statement by the City of Yonkers. The memorandum is in response to the joint application by the Department of Justice and the NAACP for an order directing the city council to take certain actions by certain specific dates.

The memorandum reads in pertinent part, page 3:

"The city urges the district court to avoid a situation where it is in the position of ordering the city council to adopt specific legislation with respect to the zoning ordinance and other necessary legislation required to implement the long-term plan. No purpose can be served at this point by ordering the city council to adopt the zoning legislation now being drafted.

"Instead the court should enter an order adopting the necessary changes or additions to the Yonkers zoning ordinance necessary to implement the long-term plan order.

"See United States v. Yonkers Board of Education, 837 Fed 2d, 1181, 1237, Second Circuit 1987."

Exterpolating now. It is a reference by the City of Yonkers, an invocation by the City of Yonkers of that portion of the decision of the Court of Appeals which affirmed the court's order directing that certain actions be deemed taken in the absence of action by the City Council.

Returning, then, to the city's memorandum:

"This is not a situation where the normal considerations of comity require this court to give the city an additional opportunity to adopt the specific legislation necessary to implement the long-term plan. The long-term plan order was entered by this court over the city's objection and now the city has indicated by the defeat of the resolution proposed by the court that it will not voluntarily adopt the legislation contemplated by that order.

"Under those circumstances there is no fruitful purpose to be served by directing the city to approve the legislation under

threat of contempt. All that is furthered is confrontation and the painful possibility of contempt and bankrupting fines.

"Similarly, with respect to Resolution No. 125, no helpful purpose can be served by directing the city council to withdraw it. The City Manager, Corporation Counsel and outside counsel to the City of Yonkers have all indicated that they will take no action in furtherance of the resolution. The resolution for all intents and purposes has no force and effect.

"If this court concludes that the resolution is inconsistent with prior orders of the court and the obligations imposed upon the city, then the court should declare the resolution null and void. Upon doing so there is no need for the council to withdraw."

Now, that memorandum received yesterday, plus a provision suggested in the order submitted on behalf of the Department of Justice and the NAACP, suggests that maybe a way of proceeding exists which will be more constructive, less confrontational than the present situation.

My reference to the proposed order is to the last paragraph which talks of the court taking other actions as necessary, including the possibility of relieving the City of Yonkers and/or the city council of functions previously reserved to it by the terms of the long-term remedy order and the consent decree of January 28, 1988 and creating and requiring the city to fund entities accountable to the court and with the power and authority to implement the outstanding housing remedies.

I am of the opinion, reinforced by the city's memorandum, that perhaps that time has come and that the court and the parties and the city council should realistically confront the situation which now obtains, a situation in which the city council adopts resolutions which are recognized as being indefensible.

I would suggest—

Let me make one preliminary comment. The suggestion by the city that rather than directing the city council to do things, the court act has two problems.

The first problem is that this court is not eager to assume any greater role than the circumstances require, not out of a lack of

interest, concern or power but rather a concept of what the proper role of a federal court is in a circumstance such as this.

Second, the suggestion by the city that the matter be dealt with by court action rather than by city council action is a useful and productive procedure provided that there is no necessity at any stage to return to the city council.

Obviously, if the city council were to say, well, Judge Sand, those are your orders, you do with them what you will but at some point we will reassert our authority, then we are engaged in an exercise which doesn't get housing built.

With that by way of background, I would invite the consideration and comments of the parties to the following:

That there be created by an order of this court an entity, the Yonkers Affordable Housing Commission, to be comprised of the following persons:

The city manager of Yonkers or his designee, the head of the Yonkers municipal housing authority or his designee, a representative of the United States Department of Justice, a representative of the NAACP, the fifth member to be the executive director of the office of Fair Housing Implementation who shall serve as chairman of the commission and who shall have a vote only in the event of a deadlock among the other members of the commission, that is, will have only a tie breaking vote.

In the event that any commission action shall be predicated on the casting by the executive director of a tie breaking vote, any member of the commission may appeal the matter to the court for its determination.

Any vacancies in the membership of the commission shall promptly be filled by the nominating party, if such vacancy shall exist for more than 20 days, by the court.

Any and all funds necessary for the operation of the commission shall be provided by the City of Yonkers from its general treasury.

All of the governmental functions heretofore vested in the city council insofar as they relate to the housing envisioned by the housing remedy order, consent decree and long-term plan shall

vest in the Yonkers Affordable Housing Commission including, but not limited to, adoption of zoning variances, density bonuses and any other actions necessary or appropriate to facilitate construction of said housing.

In a manner consistent with said remedy orders to the maximum extent possible deference shall be given to the existing enactments of the city council and such views as it may from time to time see fit to communicate to the Yonkers Affordable Housing Commission but such enactments or expressions of views shall not be binding on the commission.

The city council may at any time petition the court to rescind this order vesting authority in the Yonkers Affordable Housing Commission and to abolish that commission upon a showing of the city council's willingness and ability to function in a good faith, responsible fashion in implementation of the housing remedy orders of this court.

Were such an order promulgated there would also be adopted the affordable housing ordinance of the City of Yonkers generally along the lines of the draft submitted by the Abeles firm which draft tracks the long-term plan except that where reference is made to action by the City of Yonkers or any of its agencies, such as the Yonkers Planning Commission, there would be substituted the Yonkers Affordable Housing Commission.

Subject to such modification of dates as may be appropriate, the other provisions in the proposed order of the Department of Justice and the NAACP with respect to appointment of a director of the office of implementation, dissemination of information and so on would also be adopted.

If there are any questions, I will attempt to answer them. If the parties are prepared to comment on the court's suggestion now, I would hear them. If they wish to adjourn until tomorrow to give the matter further thought or consultation, I would entertain that as well.

Does anybody have any questions or wish to make any comment?

MR. SUSSMAN: Your Honor, I know some of the clients are here, Mr. Wallace, the head of the NAACP. Is it possible to have a ten minute adjournment?

THE COURT: Yes. I should also note the presence of the corporation counsel, the mayor and the city manager and, yes, and it need not be ten minutes. Why don't you simply advise me when it is that you wish to reassemble.

(Recess)

(In open court)

THE COURT: Well, someone. (Pause) It is a rare moment. Mr. Sculnick.

MR. SCULNICK: Obviously, I am anxious to hear the views of the other parties as well, but quite simply the city would like to bring it back to the council to give it some consideration. Your Honor has obviously given it a great deal of thought and it deserves commensurate thought by the city council.

It does come as something of a surprise because I think it goes a bit further than the point we were trying to make in our memorandum, but I understand your position. The MHA is unsure of its role. Its role has traditionally been related to public housing and this puts it into the long-term plan. These are issues we would like to give some consideration to.

THE COURT: Mr. Heffernan.

MR. HEFFERNAN: Your Honor, I have not been able to reach the ultimate departmental official that would have to make a final decision but I do have a few comments.

Your Honor, our reaction would be negative to the proposal of the court. Our reason for submitting a proposed order as we did was very simple.

One of the things that we all learn as we grow up, your Honor, is from a very early age there has to be respect for the law and in this case quite plain and simply the City of Yonkers has shown a total disrespect for the law.

While this court was affirmed by the Second Circuit in a law [sic] on June 13 the Supreme Court decided not to disturb: When two years passed, the housing remedy order; where six months passed, the consent decree. Nothing has been done in this case and past the submission of the city, the brief you were handed this

morning clearly indicates the city council of Yonkers simply does not want to take any responsibility for carrying out the law.

They want to flout the court's orders. They want to make all kinds of statements in the press and everywhere else about your Honor, about the orders, about what they are not going to do and they want once again to be let out from under having to do anything so they don't have to explain to their citizens why they are doing something or not doing something.

I would read, your Honor, from a New York Times article that I just was handed this morning from Sunday, July 10, and in talking about the proposed order of the United States and the hearing today, the article reads as follows:

Councilman Nicholas V. Longo, the Republican minority leader and one of those who voted for condemnation of the church property, said: I don't think the votes are there for the council to reverse itself. He anticipated a contempt hearing before the judge.

Asked if he was prepared for that and the possible consequences, Mr. Longo said that "At that point we'll be able to assess the wisdom and veracity of Mr. Spallone who says the judge will never do anything."

Your Honor, we believe the court has to do something here. We believe the court has to send a message to the city that it cannot continue to flout the court's orders and then have the court let it off the hook by doing something else.

We think and the reason we proposed the order as we did, your Honor, is we believe the city must take responsibility for its actions. It has to implement the long-term plan. It has to appoint a housing director. It has to do it within the timetable that we set forth and, if it doesn't, the United States is fully prepared to move forward with contempt.

Thank you.

THE COURT: Mr. Sussman.

MR. SUSSMAN: I can't speak except if I am standing at a podium, so I am moving over here.

I disagree strongly with the comments of the United States, Judge, and I also don't think that this matter should be remanded to the city council of the City of Yonkers for any decision on its part.

I don't think this is a matter that should be determined by consent of the city council. I think they long since altered that. The court should enter the order provided by the court on its own motion and in light of comments by all parties should enter this order.

I don't see the City of Yonkers coming back to the court as it has done so many times before with some alternative or some other impact. I think we are beyond that.

Let me make a few comments directly on what the United States has said and some of the specifics your Honor laid out. The fact of the matter is that the order which was prepared jointly by the United States and NAACP has essentially a sequence of events in it as I am sure the court is aware.

The sequence of events are, first, fines, then potential jail time, then and upon a finding of contempt with reference to failure to abide by orders after those two fairly strong measures, then we would according to the sequence of that order go forward with the creation of a new entity which would be funded by the City of Yonkers to carry out tasks that Yonkers still had not carried out. That is the sequence.

Frankly, that sequencing in my opinion is unnecessary. I think what the court has suggested this morning speaks to the non necessity of the sequencing. It seems to me it is clear that the only issue now before the court really, as you put it yourself, is whether there should be fines and contempt because the City of Yonkers through its counsel has refused the act and thumbed their nose at the court through the public statements, resolutions and non-compliance or whether that step essentially should be itself circumvented or ignored.

In other words, no fines, no jail and simply the most drastic action taken, which would be the stripping of the City of Yonkers' governmental officials directly of their responsibilities. That is the third event in the order. It would be the first event in the court's directive.

In my opinion is a fully justified event. I don't think we have to go through and to my mind there is really the charade of the city council not taking actions they have been ordered to take as they already said they would not take and then being fined which, as everyone knows, would redound substantially to the detriment of the minority community in Yonkers. There is no doubt about that.

There is really nothing that the court has indicated it would do about that. The court has always taken the position that the internal budgetary affairs of Yonkers are apart from this case. The court has been consistent with it and, therefore, what we are left with is Yonkers perhaps paying millions of dollars in fines, budget cuts that affect deleteriously our side of the community much more without any real recourse.

Then we get jails and the jailing of people which certainly can be justified, as would the fines be, I am not saying they wouldn't be justified. The question is to what effect.

I said a year or two ago about the subject, and I really believe the same is still true, that what we have is the creation of martyrdom. We assure their political success so they would succeed themselves and I don't really see a great purpose to be served by that.

I think the message that has to be sent and I think it is consonant with what the government has said, Mr. Heffernan, that you have not obeyed the law. You told us you are not going to obey the law. Your chance is up. Goodbye.

Now, I think the problem with the court's proposal is in a way it is not strong enough on that point. Let me make a few comments about that. I don't think any order now should say that this five member body should pay deference to existing enactments of the city council and then have language that such enactments would not be binding. I don't think there is any place for that. We know what those are.

THE COURT: That was a reference to existing zoning, existing—

Obviously, when you consider any housing or any development, you look at what is in place. I certainly did not mean to

include the last two resolutions of the city council with respect to the court's view as to whether they are null and void, I thought I had already made clear that I not only regard them as being null and void but the very adoption of them being contempt of court.

MR. SUSSMAN: I guess the point is that perhaps we should have a more specific order which directs this group to the existing and as changed zoning ordinance of the City of Yonkers, building codes, whatever else needs to be referred to, but it should be made clear in this order, I think language should be included, that if the city council of Yonkers is specifically on notice that should it take actions and pass resolutions intended to impede the work of this commission, the court would view that as contemptious. I think that needs to be here.

Sure, their input on matters of substance where those inputs are made in good faith, fine. I don't have a problem with inviting that. I do have a problem with the suggestion that other than long-standing zoning ordinances, as they are amended by the long-term order legislation, that other than that, any deference should be paid whatsoever. I think the contrary and we also have conferred with Mr. Wallace.

We also have a few other concerns I would like to put before the court. First of all, the NAACP would like to be represented on the group and I believe that at present the NAACP would be a proper and appropriate designee rather than "counsel", meaning myself.

At the same time we would like for any order to permit at meetings counsel to be present for the reason that given the long-standing involvement I have had in this case and the nature of the organization, obviously changing presidencies and different technical issues which any president may learn about but in the transitional period, we would like that to be explicit so there would be no dispute.

I understand we would have one vote cast by the president, but we would like to have counsel's presence permitted at the meetings.

We also feel that the city should be on clear notice that if it has two designees out of five, which is what effectively is being

done, excluding the executive director of the Fair Housing Office, that those designees are to act here in furtherance of the orders.

I don't want to create a situation quite honestly where everybody is two-two and we go to the executive director and we are appealing everything to the court. It would extend the stalemate and would only lead to tremendous delays.

If the city is going to be able to participate with two votes essentially, and I respect the independence of the MHA and the possibility of political leverage, we can't have people there doing the bidding of the city council which led to this in the beginning. It is institutionalizing the deadline and that leads to the court having to play a greater role rather than a lesser role.

We will be here having a review on every vote. I think we have to set this up with the cognizance that if there is to going to be representation of the city, those representatives have to act in furtherance and be able to defend what they do, as we do, in furtherance of the objectives.

Now, let me just make a couple of other comments and I don't know if we will discuss this in any further detail. I am not satisfied with the legislation prepared but it does, as your Honor says, track rather respectfully the decree. It seems to omit things that such legislation should really deal with or purport to deal with. Let me just mention a few of those things and make a proposal which I have discussed with other counsel on this.

Just let me mention three problems that we see or I see at least in the legislation. First of all, the legislation provides that the planning board, your Honor has now said your order is going to be signed, the proposed order would make this new group, the Affordable Housing Commission, that group would have decisional responsibilities.

Clearly under state law there would be appeals both by property owners who don't like what is being dispensed to them and by potentially neighborhood groups or neighboring property owners who believe that whatever is being done trespasses some right of theirs. I think the legislation is going to have to deal with that question.

I don't think it can be silent on that or we will have a repeat of what we have had with the seminary and the racetrack. I think we

either have a process that is called for in the legislation by which anyone who has such complaints have to provide written notice and there is an appeal process administratively and recourse to the courts.

I believe the recourse should be to this court because I believe if we don't do that we have the prospect of substantial delay, nonimplementation, et cetera. I respectfully argue that this court might want to appoint a magistrate to handle many of those details because this judge I know has 400 odd cases and every appeal can't really be handled here.

THE COURT: The reason behind having the chairman exercise only the tie breaking vote but to vote before the matter came to the court was a hope that that would minimize the occasions on which there would be recourse to the court and that any matter that did come to the court would come to the court to review a determination that had already been made.

Obviously, when you create any body, its effectiveness is largely a function of the caliber and integrity of the persons who occupy that body. The thinking was to have—with respect to the two representatives of the city—to have persons who were in fact representative of the city but who did not hold elective office.

I am aware of the fact that individuals may change and one cannot assume the continuity of the present encumbents, but I don't know of any language that can be put into a decree which is anything other than precatory which says that persons are to act responsibly—

MR. SUSSMAN: I agree.

THE COURT: —and in good faith.

MR. SUSSMAN: It might be described as precatory, but I do think that the notion is that this body is being created to carry out orders rather than carry on debates has as to whether orders ought to be carried out is an important conception.

With respect to the means, there may be disputes in given cases but that presupposes a general agreement as to objectives

which the members of the group in my judgment have to share. I think the order has to be premised on the fact that we share them. Not we are just adjourning all our disputes about whether anything is going to be done at this meeting.

Frankly, we will just really be wasting our time and effort and motion. It will have a polarizing rather than a curative effect. I think that is really a difficult decision the court has to make.

For the NAACP, we are prepared to sit in a room with the government, with the executive director and with the city manager, with Mr. Smith and deliberate on a case by case basis which is, of course, the nature of the deliberations this body would engage in with the understanding that those in the room are implementing an order and not that we are debating whether the order should have been entered.

THE COURT: Let me also—just sharing thoughts with you. Ideally the chairman would be the key figure here and the body would be—once the chairman had earned the respect of the commission, would function in the nature of—the relationship would be analogous to a chief executive officer and a board of directors. That would be the ideal.

MR. SUSSMAN: You are referencing the sense of deference which is accorded generally to the operating procedures that are undertaken by that chief executive with review in policy matters by the board.

THE COURT: Yes.

MR. SUSSMAN: Let me make a couple of other comments. While I agree entirely that the planning board, and I believe it is the planning board, should not have the functions at this point in time, rather they should be superseded by this body in terms of decisional functions.

It is also true there has to be a provision allowing the executive director to make use of the staff to the extent necessary in effecting the analyses that must predicate his recommendations. Again I don't think that should just left be up to—that is an expectation—I think that should be in any order that the city is directed

to provide that support staff as needed to do the analyses and again I think what we are really doing here is bifurcating between the political wing of the city and the administrative wing. I think that is really what is being attempted.

THE COURT: You see, as so often happens in our society, the problems end up on the desk of a federal judge. There are other approaches that the city council might have taken to deal with the problems it confronts, but it has not done so. It has come forward with no affirmative suggestion other than that the court do it.

I don't want to get into a debate with any individual city councilman, but I do think it's appropriate that I repeat something which I think I have said on more than one occasion in the eight years of this case.

The problem before this court is not whether it has power to effect its remedies. It has vast powers. Bankrupting Yonkers is simply one of them.

I have from time to time as a mental exercise drawn up a list of the possible sanctions that could be invoked. Incarcerating representatives of Yonkers is simply one of them.

One could draw up a list of all the discretionary benefits which the City of Yonkers receives and go down them item by item and raise the question whether it is appropriate that a community which has chosen to be the national symbol of defiance to federal civil rights orders is an appropriate community to be the recipient of such discretionary funds. I could go on and on.

The suggestion of the commission, and it is only a suggestion, is not viewed by this court as a retreat from the exercise of power. It is simply an alternative means of accomplishing what is the prime objective. The prime objective is not a civics lecture. I have given too many of those. The objective is to get some housing built.

MR. SUSSMAN: Just two other points. I frankly think that is a principal issue and it may in fact, judging from the govern-

ment's remarks, be a slight difference in emphasis between the NAACP, for instance, and the government.

I think as well that overwhelmingly the critical need is implementation. The City of Yonkers actions to me are relevant mostly because they have impeded implementation.

THE COURT: They have abdicated, but the recognition is that they have abdicated, whether from choice, voluntarily or by virtue of circumstances, there is an abdication of that role and there is a vacuum and we have to deal with that.

MR. SUSSMAN: If you perceive the vacuum needed to be filled as the priority as I do and perhaps as the court does or whether you see the key issue as has been very well stated as a community's refusal to follow federal court orders and the issue being compelling them to follow court orders, I think that is a very critical question, but given the amount of time that we have spent, to spend more time in a sense playing out whether we can force them to comply and at what cost, that is, fines, jail, the like, in a sense as opposed to getting the structure in place or playing that out before we get a structure in place doesn't seem to me at this point justified. I think that is an issue.

THE COURT: The other way in which the matter may be dealt and there are some decisions I think that can be made fairly promptly and some may require some further thinking is to treat the matter generally as it is treated in the proposed order. That is, the creation of the entity being one of several steps that are to be taken.

What I think might be the most appropriate way to leave things is to set a schedule for various things that are to happen and for the filing of further comments.

Let me also raise in connection with the commission concept a problem which I perceive but frankly do not know the definitive answer to and that is the relationship between the commission, the finances of Yonkers and the Emergency Financial Control Board.

For example, one of the functions of the commission would be to deal with applications for tax abatement. How that gets structured in in terms of the overall financing of Yonkers and its obligations vis-a-vis the Emergency Financial Control Board, if it has any, which relate to finances are matters which I think should be thought of by the parties.

It seems to me the first and immediate matter to be dealt with is the appointment of the director of a Fair Housing Office. There would be such a person, whether he will occupy the role limited to that envisioned in the long-term plan or the greater role envisioned in the court's suggested commission probably does not significantly alter the background qualifications one should be looking for for a person to occupy that role.

Now, I have received a list of candidates.

I am talking about the Office of Implementation and not the Fair Housing Office. I get bogged down in the titles.

Has everybody been furnished a copy of the resumes?

MR. HEFFERNAN: Are you talking about Oscar Newman—

THE COURT: I have a letter from Oscar Newman dated June 30 with the resume of a few candidates which says "it is the intent of the city manager and myself to interview shortly after I return from vacation." I think he is back today.

MR. HEFFERNAN: Your Honor, if I may ask a question. In the city's brief we got this morning it said the city received 28 resumes and the city manager has forwarded the top six candidates for review.

If I could ask Michael Sculnick whether those are the same people as the judge is talking about or whether we are talking about different people?

MR. SCULNICK: I think those are additional people.

MR. HEFFERNAN: That will be 11 or 12 now?

MR. SCULNICK: 12.

THE COURT: I would like to set the earliest possible date for the court to interview the leading candidates. Could that possibly be this week? Could we do that Thursday?

MR. SUSSMAN: Sure.

THE COURT: Thursday morning—

MR. HEFFERMAN: Your Honor, again, there is a meeting scheduled, which has some importantance, on Thursday morning at 10:30.

THE COURT: All right.

MR. SCULNICK: Your Honor, I think it would be impractical for the court to be interviewing them by Thursday because neither the city manager or the outside housing authority has interviewed anybody. I think there should be that screening process and perhaps by early or middle of the next week, but I don't think anybody could come forward to the court this week.

THE COURT: Let me have, then, by Tuesday of next week the resumes of the leading candidates and, if possible, if there is a consensus candidate, that would be very nice. If not, then I will interview the two or three leading candidates. I will set the date for that interview after I have received the recommendations next Tuesday.

With respect to the proposed ordinance, whether it is adopted by the city council as directed by the court, adopted by the court or adopted as the first act of the Yonkers Affordable Housing Commission, really affects some of the provisions but does not affect many others.

MR. SUSSMAN: On that matter we had ourselves—since we just got this—I think counsel have agreed that next Monday we are going to meet with Abeles and Schwartz and try to get together some additions.

THE COURT: Fine. Then you are going to meet on Monday.

MR. SUSSMAN: I think by the end of that week we were proposing to have it finished and have it in final form essentially, which would be the 22nd.

THE COURT: All right. Then with respect to the concept of a commission—first of all, let me say that some of the points that you have made as to the language of the commission and so on I think are, Mr. Sussman, well taken and I certainly have not purported to do anything but broadly outline how such a commission should be constituted.

With respect to the matter raised with respect to whether Mr. Smith as the head of the MHA should be a member of that commission or someone else, I was really, apart from my personal admiration of Mr. Smith, I was looking for somebody knowledgeable in housing in the City of Yonkers and not an elected officer.

MR. SUSSMAN: Can we have ten days to make comments on that, perhaps?

THE COURT: Yes. Understand I am not wedded to it. I think that it might be useful here. It might be useful in alleviating this repeated crisis and confrontation in Yonkers which certainly must be harmful to a community which is seeking to attract industry and achieve other improvements in its circumstances.

You asked for ten days for comments. What I have been trying to do is not to hold everything in abeyance. You had suggested for example, in the order that by July 26 there be a dissemination of matters. Obviously that timetable will have to be altered.

Ten days will take us to the 23rd of August. I am wondering whether we should schedule another meeting now—

MR. SUSSMAN: The 22nd of July. You said August.

THE COURT: The 22nd of July. Should we schedule another session on July 26? That is a Tuesday. July 26 at 10 a.m.

Is there anything other than the matters we have specifically indicated that should be going forward between now and then?

MR. SUSSMAN: Judge, there is one other matter that is of concern. I don't know if there is any record of it yet. I believe this court provided direction regarding the seminary site and the raceway site and I think that we need to know what is happening with those sites at this time.

THE COURT: What is happening physically, legally?

MR. SUSSMAN: Legally. The matter was remanded.

THE COURT: Mr. Sculnick, can you enlighten us as to what the status is in the state court?

MR. SCULNICK: It is my understanding that the proposed orders and briefs are fully submitted and the state court has not sought any further argument or input from any party so it is submitted to the state court judge.

THE COURT: Oral argument is scheduled for next week in the appeal from my orders?

MR. SCULNICK: Yes.

THE COURT: And there is one other matter pending on appeal with respect to the schools?

MR. SCULNICK: That is a pending decision, yes.

THE COURT: All right, then. Let's review it.

By Tuesday of next week—

Mr. LaRIZZA: Could I ask a question before you do? Would the Affordable Housing Commission have any responsibility at all with respect to the 200 public housing units or is it limited—would its responsibilities be limited only to the affordable housing, trust funds housing?

I ask the question, your Honor, because I believe when you described the basis for the commission you mentioned that it was to implement housing and my recollection is that the remedy order includes the 200 units.

THE COURT: If all of the orders of this court now in effect were to go forward, it would seem to me that this commission

would have little or no operative responsibilities with respect to the 200 units except, of course, as the long-term plan itself indicates one of the considerations in terms of sites for affordable housing and so on would be the sites for the 200 units.

If for any reason there should be a need to revise any of the existing orders, then one might then revisit that question. I think that is a specific as I can be.

MR. LaRIZZA: Thank you, your Honor.

THE COURT: Let's review again what is to occur.

By Tuesday of next week I am to be furnished with the resumes of the leading candidates for the director of the Office of Fair Housing Implementation, executive director.

I understand that the parties are meeting next Monday with Abeles and Schwartz to consider the proposed affordable housing ordinance.

That by July 22 I am to have received comments from all of the parties with respect to the ordinance and with respect to the proposed commission. With respect to the commission proposal, I would like to see a draft of an order appointing such a commission dealing with some of the issues which have been raised. I would ask that such an order be prepared even if there is no strong sentiment in favor of such a commission.

MR. DUDLEY: Your Honor, which date are the comments due by?

THE COURT: The 22nd.

We will meet again on July 26 at 10 a.m. If any emergency matter or other circumstance arises so that it would be appropriate for us to meet at an earlier date, we can arrange to do that. This is a matter of utmost urgency and the court will make itself available.

Is there anything else?

All right. Then, we are adjourned until July 26 at 10 a.m.

(Adjourned to July 26, 1988 at 10 o'clock a.m.)

EXHIBIT W

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

- against -

80 CIV. 6761 (LBS)

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; AND YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

CITY OF YONKERS COMMENTS WITH REGARD TO THE PROPOSED YONKERS AFFORDABLE COMMISSION

At a July 12, 1988 hearing, the Court invited the comments of all parties to a suggestion made by the Court that there be created an entity entitled The Yonkers Affordable Housing Commission ("Commission"). The Commission, which would have four voting members (comprised equally of Plaintiff and Defendant representatives) and a tie-breaking chairman (the Executive Director of the Office of Implementation), would be vested with all governmental functions currently held by the City Council as they relate to the housing envisioned by the Housing Remedy Order, Consent Decree and Long Term Plan, including but not limited to, granting tax abatements, adopting zoning variances and density bonuses, and taking other actions necessary or appropriate to facilitate construction of housing under those decrees. (Tr. of hearing July 12, 1988, at p. 7).

After giving the Court's suggestion due consideration, the City Council wishes to convey its serious concerns regarding a proposal which would, in substance and effect, divest the Council of specific state law powers, including core legislative as well as executive functions. Specifically, the City Council now has powers under state law to grant tax abatements, in accordance with

statutory requirements, and also has authority under state law to adopt zoning ordinances, grant zone changes, and review requests for variances and special exception uses under explicit statutory criteria. The loss of those specifically granted powers must be viewed with great caution and concern from the perspective of a City Council which is popularly elected. As there is little doubt that the City Council would lack the power to delegate those functions to a Commission which is not popularly elected, it is therefore not in a position to consent to such a proposal.

Our review of the caselaw indicates that whereas there is precedent for assuming certain administrative functions in prison or school board cases*, we know of no case in which, as a remedy for findings of violations of the Fourteenth Amendment, a federal court has actually supplanted the legislative functions of a local municipality. In those cases where the Court has appointed a monitor or committee to oversee the administration of a school district undergoing desegregation, *see e.g., Reed* vs. *Rhodes, supra,* no legislative powers were superceded. While it may be accepted jurisprudence that a federal court has the power to override, in a specific instance, actions of a local legislature which are in violation of the Fourteenth Amendment, *Hunter* v. *Erickson,* 393 U.S. 385 (1969), we know of no judicial authority which would permit, in the first instance, the creation of a non-representative body which functions, in part, as a legislature.

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* *See Powell* v. *Ward,* 643 F.2d 924 (2d. Cir. 1981) (affirming appointment of special master to oversee future compliance with orders in prison case); *Morgan* v. *Kerrigan,* 530 F.2d 401, 427-29 (1st Cir.), *cert. denied,* 426 U.S. 935 (1976) (affirming appointment of Citywide Coordinating Council, which had *no* power to "co-manage or make policy for the Boston Schools"); *Reed* v. *Rhodes,* 635 F.2d 556 (6th Cir. 1980), *as modified by* 642 F.2d 186 (6th Cir. 1981) (affirming appointment of Administrator of Desegregation to implement remedial orders.)

On balance, therefore, the City cannot support the creation of a Commission as proposed by the Court.

Respectfully submitted,

VEDDER, PRICE, KAUFMAN,
KAMMHOLZ & DAY

By: s/ Michael W. Sculnick

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